United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2015

WILLIE ABRAHAM,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

JAY GOLDBERG
Attorney for Petitioner-Appellant
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DOCKET ENTRIES

CIVIL DOCKET

74 CIV. 849

UNITED STATES DISTRICT COURT

WILLIE ABRAHAM

-against-

UNITED STATES OF AMERICA

For Plaintiff:

Jay Goldberg
299 Broadway,NYC-10007
374-1040

DATE	PROCEEDINGS
Feb. 22-74	Filed Petition to vacate his conviction.
Mar. 6-74	Filed Petitioner's notice of motion for an order vacating the conviction in 62 Cr. 949. ret. 3-15-74.
Apr. 2-74	Filed affidavit of J.T. Glekel in opposition to petitioner's motion, to vacate a 1963 guilty plea.
Apr. 2-74	Filed Respondent's memorandum of law in opposition to petitioner's motion for relief.
Jul. 5-74	Filed Memorandum & order that petitioner seeks pursuant to 28 U.S.C. 2255 an order vacating a 1963 federal narcotics conviction, achieved by his plea of guilty, he is now serving a life sentence imposed pursuant to 21 U.S.C. 848 by Judge Van Pelt Bryan, in 1973 following a narcotics conviction by a jury. Rule 35 motion, can still timely be made before Judge Bryan. The petition is

DOCKET ENTRIES

DATE	PROCEEDINGS
	dismissed without prejudice to the filing of a rule 35 motion, before Judge Bryan. m/n
Jul. 18-74	Filed Petitioner's notice of appeal to the USCA from the order dated 7-5-74. Mailed copies to Jeffrey I. Glekel, U.S. Atty & Willie Abrahams.

NOTICE OF MOTION TO VACATE CONVICTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIE ABRAHAM,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

S I R :

PLEASE TAKE NOTICE that upon the annexed Petition and affidavit of WILLIE ABRAHAM, exhibits, the affidavit of JOSEPH I. STONE, ESQ. and the Memorandum of Law and upon all the proceedings heretofore had herein, WILLIE ABRAHAM, Petitioner, will move this Court at the Courthouse, located at Foley Square, New York, N. Y., in Courtroom 1305 at 2 P.M. on the 15th day of March, 1974, pursuant to 28 USC 2255 for an order vacating the conviction in 62 CR 949.

Dated: New York, N. Y.
February 12, 1974

Yours, etc.,

s/ Jay Goldberg
JAY GOLDBERG
Attorney for Petitioner
299 Broadway
New York, N. Y. 10007
(212) 374-1040

TO:

UNITED STATES ATTORNEY
U.S. Courthouse
Foley Square
New York, N. Y. 10007

AFFIDAVIT OF WILLIE ABRAHAM
IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WILLIE ABRAHAM, being duly sworn, deposes and says:

This affidavit is submitted in support of the motion made by me pursuant to 28 USC 2255 to set aside a 1963 narcotics offense conviction on the grounds: (1) that I was without knowledge that I would be ineligible for parole from the sentence I was to receive prior to the taking of the plea and I would not have pleaded guilty if I had been informed of my ineligibility for parole; (2) I was not informed prior to the taking of my plea, that despite unlawful possession of the drugs I could have secured a not guilty verdict if a jury believed my honest disclaimer of knowledge of illegal importation. I had no knowledge whatsoever that the drugs were imported from another country and would not have pleaded were I aware of this defense.

I do in this affidavit categorically waive the privilege regarding any advice I received or any

conversation or communication I may have had with any attorney on the subject of pleading guilty, the consequences thereof and the reasons for entering the plea.

This was my first charge in any court for a violation of narcotic laws. I had never been in a federal court before that case. I felt that with my record were I to plead guilty I would not only stand a chance of a minimum sentence of 5 years, but believing parole a possibility would see the parole board in 20 months standing an excellent chance for such early release in light of my background. As it turned out I was ineligible for parole and had to do 44 months before being manditorily released. Had I known that ineligibility for parole was a consequence of the plea I would have chosen to go to trial. Though I learned of my ineligibility after commencement of my sentence I did not realize until recently that a post conviction motion on that ground was a possibility.

Further, at the time of my plea I was unaware that despite my unlawful possession of the drugs I still could secure a not guilty verdict if a jury believed that I was unaware that the drugs were

illegally imported. I truly had no knowledge of illegal importation and would have gone to trial if I had been made aware of this defense.

WHEREFORE, I pray that the relief be granted.

s/ Willie Abraham
WILLIE ABRAHAM

(Duly sworn to on
February 13, 1974.)

PETITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

COMES the Petitioner, WILLIE ABRAHAM, and moves this Court pursuant to 28 USC 2255 to enter an order vacating his conviction rendered on his plea of guilty in 62 CR 949.

1. Petitioner is not presently serving the sentence on the conviction at issue in the case at bar. He is presently incarcerated in Federal Prison on a subsequent narcotics conviction.

2. It is claimed first that the conviction should be vacated on the ground that the guilty plea interposed by him in Indict. 62 CR 949 charging a narcotics offense was not entered voluntarily with a full understanding of the consequences of his plea in that he was unaware that he was ineligible for parole from the sentence he would receive, and secondly that he was unaware that a not guilty verdict could be secured if a jury believed his honest disclaimer of knowledge of illegal importation and had he been made aware of these two things prior to plea he would not have pleaded guilty.

PETITION

Because of the foregoing facts Petitioner's conviction under Indictment 62 CR 949 is in violation of the Constitution of the United States and he therefore prays that this motion be granted and an order entered vacating said conviction and sentence.

Dated: New York, N. Y.
February 12, 1974

s/ Willie Abraham
WILLIE ABRAHAM
Petitioner

TO:

UNITED STATES ATTORNEY
Southern District of New York
Foley Square
New York, N. Y. 10007

(Verified by Petitioner on February 14, 1974.)

AFFIDAVIT OF JOSEPH I. STONE
SWORN TO FEBRUARY 13, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOSEPH I. STONE, being duly sworn, deposes and says:

I am an attorney at law. I was the attorney who represented petitioner in Indictment 62 Cr 949.

I have read petitioner's affidavit sworn to February 1974. I have no recollection of any discussions with him in 1963 relative to his ineligibility for parole as a consequence of his guilty plea. Further, I am unable to recall if my custom was in 1963 to advise defendants that this was a consequence of a guilty plea.

The petitioner also alleges that he was unaware that despite his unlawful possession of drugs he could secure his acquittal were a jury to believe his disclaimer of knowledge of illegal importation. I have no recollection of any discussions with petitioner relative to this defense.

The taking of the plea on January 8, 1963

AFFIDAVIT OF JOSEPH I. STONE
SWORN TO FEBRUARY 13, 1974

was hurried. I was actually engaged on trial before Mr. Justice Sidney Fine in Supreme Court, New York County, in the case of People vs. Rosalie Martin, 2184/62. I had just completed my opening statement to the jury in that case when I was required to go to the U. S. Courthouse to attend the petitioner's case. When Judge McGohey asked whether I was ready for trial I responded that the defendant "will tell me exactly his situation in one minute, ... ". The defendant decided to plead guilty, but I cannot now recall out discussions prior to the taking of the plea. As soon as the proceedings were concluded, I rushed back to the Supreme Court to resume the Martin case.

s/ Joseph I. Stone
JOSEPH I. STONE

(Duly sworn to on
February 13, 1974.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PETITIONER'S MEMORANDUM OF LAW

The Facts

In 1963 petitioner pleaded guilty to a narcotic offense. The charge in that case was the first narcotic charge ever made against defendant in any court: It was his first experience in a federal court.

He asserts (1) that at the time he entered his plea on January 8, 1963, the Court did not inform him that he would be ineligible for parole from any sentence to be imposed; (2) that his counsel had not informed him that such ineligibility would be the consequence of his plea; (3) that he was without knowledge of such ineligibility; (4) that he was unaware that a not guilty verdict could have been secured if a jury believed his honest disclaimer of knowledge of illegal importation; and (5) that he would not have pleaded guilty if he had been informed of his ineligibility for parole and the defense as to lack of knowledge of illegal importaion.

He has submitted an affidavit of his then attorney and has categorically waived his privilege regarding any conversation or communication he may have had with any attorney on the subject of pleading guilty, the consequences thereof and the reasons for his entering the plea.

Argument

Petitioner's guilty plea would be valid and binding only if the court complied with Rule 11 as it existed in 1963. The rule at that time provided that: "The Court may refuse to accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge."

A prerequisite is that the defendant taking the plea understand the consequences of the plea. Julian vs. U. S., 236 F2d 155, 158 (6 Cir. 1956); Fultz v. U. S., 365 F.2d 404, 408 (6 Cir. 1966); U. S. vs. Caruso, 280 F.S. 371, 373 (SDNY 1967). This includes understanding the "worst of those consequences that can be forseen as of the time the plea is taken." Caruso, supra.

In point are two cases: Bye vs. United States, 435 F.2d 177 (2d Cir. 1970) and United States v. Welton,

439 F.2d 824 (2d Cir. 1971). In Bye the Court held that a defendant pleading guilty to a narcotics offense must be informed by the District Court of his ineligibility of parole. Bye alleged that he, unaware of his ineligibility for parole at the time of his plea and that if he had known, he would not have pleaded guilty. The Court remanded for an evidentiary hearing as to whether he was aware of his ineligibility for parole. In Welton, the issue was whether in cases where judgment was entered upon a guilty plea on or before October 14, 1970, the date of the Bye decision, a defendant would be entitled to rely on the reasoning in Bye to attack a conviction in a plea of guilty if it was shown he was unaware of the ineligibility consequence and would not have pleaded had he been so informed. The Court held Bye applied to pre October 14, 1970 cases and a hearing was required if a defendant alleged his lack of knowledge, that had he been informed he would not have pleaded, if he submitted a supporting affidavit from his trial attorney and waived the attorney-client privilege regarding the subject of pleading guilty, the consequences thereof and the reasons for his entering the plea.

PETITIONER'S MEMORANDUM OF LAW

Petitioner has made a sufficient showing warranting a hearing.

The burden is upon the Government to prove voluntariness and understanding by petitioner of the consequences of the plea. Banks vs. U. S., 319 F.S. 649 at 650 and 652 (SDNY 1970).

It is of no moment that the petitioner was represented by counsel, Banks, supra at 650-651.

Nor is laches a bar to this proceeding, for it has been stated:

> "Counterbalancing the judge's failure to inquire is what might be considered laches on petitioner's part. Twelve years elapsed between the entry of the guilty plea in 1957 and the institution of the present motion in 1969, during which time Banks served the five-year sentence and was convicted of a second crime, the sale of heroin, in 1964. However, the passage of time does not bar this motion or remedy a failure to comply with Rule 11. Cf. Halliday v. United States, supra, 280 F. 2d at 272 (defendant convicted in 1954 was permitted to challenge that conviction for the first time in 1966)."
>
> Banks, supra at p. 652

The petitioner further alleges that prior to the taking of his plea he was unaware that despite his unlawful possession of drugs he could nonetheless secure a not guilty verdict if a jury believed evidence disclaiming his knowledge of unlawful importation.

It is clear that the minutes of plea taking reflect that neither the Clerk nor the Court in any way indicated that the corpus of the crime was not only possession, but knowledge that the drugs had been imported. See U. S. vs. Peeples, 377 F.2d 205 (2d Cir. 1967). The Court did not explore such a possible defense to the charges.

The rule in this Circuit as to the validity of pre 1966 pleas is crystal clear. In U. S. vs. Lester, 247 F.2d 496 (2d Cir. 1957) it was stated:

> Rule 11 "clearly contemplates that there be something more than a perfunctory examination conducted by the prosecutor that does not serve to inform the judge of the extent of the prisoner's knowledge of the consequences of his choice of a guilty plea. A mere routine inquiry--the asking of several standard questions--will not suffice to discharge the duty of the trial court. It is the dury of a federal judge before accepting a plea of guilty to thoroughly investigate the circumstances under which it is made. United States v. Davis, supra. Cf. Johnson v. Zerbst, 1938, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; Kercheval vs. United States, 1927, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009. Even when the defendant is represented by counsel it has been held that the mere statement of the accused that he understands the charge against him does not relieve the court of the responsibility of further inquiry.
>
> * * *
>
> ". . . Comprehension of the charge demands more than familiarity with the crime alleged.

The court must determine whether the plea has been improperly induced by the prosecutor and whether the defendant is aware of 'the nature of the charges, the statutory offenses included within them, and the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.' Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed. 309. Smith v. United States, 5 Cir., 1956, 238 F.2d 925. Such a determination may be made only by a penetrating and comprehensive examination of all the circumstances under which the plea is made.

The failure of the district court to conduct such an inquiry at the time the plea was entered denied the defendant the protection which he was entitled to receive from a federal judge."

(Emphasis supplied)

CONCLUSION

An evidentiary hearing should be ordered.

JAY GOLDBERG
Attorney for Petitioner
299 Broadway
New York, N. Y. 10007
(212) 374-1040

INDICTMENT

Form USA-33s-124 - IND./INF. - REC., CONCEAL and FACILITATE TRANSP. OF NARCOTIC DRUGS
Rev. 6/20/61

MRG:DK
31929

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Grand Jury charges:

On or about the 18th day of August, 1962, in the Southern District of New York, WILLIE ABRAHAM, the defendant, unlawfully, wilfully and knowingly did receive, conceal and facilitate the transportation and concealment of a narcotic drug, to wit, approximately 352 grams, 200 milligrams of heroin hydrochloride after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics may find necessary to provide for medical and legitimate uses only, is

prohibited. (Sections 173 and 174, Title 21, United States Code).

s/ Mrs. Syd Rabin
FOREMAN

s/ Vincent L. Broderick
VINCENT L. BRODERICK
United States Attorney

62 CR 949

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

WILLIE ABRAHAM,

Defendant.

INDICTMENT

62 Cr._____

(Violation, Title 21, Sections 173, 174, United States Code.)

VINCENT L. BRODERICK
United States Attorney.

A TRUE BILL

Mrs Ayda Raben
Foreman.

FPI ATLANTA—5-12-61—6M—2512

OCT 30 1962

Pleads not guilty – Bail continued ($15,000)

Motions to be made returnable by 11-

(Edel

JAN 1963

OCT 1962

INDICTMENT

PLEA

MP

UNITED STATES OF AMERICA

vs 62 Cr 949

WILLIE ABRAHAM

New York, N. Y. January 8, 1963 2:00 p.m.

Before HON. JOHN F. X. McGOHEY, District Judge

- - -

For the Government: Martin R. Gold, Esq.

For the Defendant: Joseph I. Stone, Esq.

- - -

MR. GOLD: Ready for the Government, your Honor.

MR. STONE: Ready for the defendant. My apologies to the Court.

THE COURT: You are ready to go to trial?

MR. STONE: The defendant will tell me exactly his situation in one minute, your Honor.

Your Honor, I have an application to make to the Court, if I may, at this time.

THE COURT: I will hear it.

MR. STONE: The defendant offers to withdraw his plea of not guilty heretofore entered and at this time offers to plead guilty to the one and only count of the indictment.

THE COURT: Have the defendant come forward.

You are the defendant, William Abraham or Willie Abraham?

THE DEFENDANT: Yes, sir.

THE COURT: How old are you, sir?

THE DEFENDANT: Thirty-two.

THE COURT: How much education have you had?

THE DEFENDANT: Second grate -- second term high.

THE COURT: Second year of high school?

THE DEFENDANT: Yes.

THE COURT: Now, you are represented here by an attorney of your own choice, are you: Mr. Stone?

THE DEFENDANT: Yes, sir.

THE COURT: And have you had sufficient time to talk to him and tell him about the facts as you understand them concerning this charge?

THE DEFENDANT: Yes, sir.

THE COURT: And he has told you that upon a plea of guilty you must be sent to jail?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody threatened you to make your plea of guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading guilty of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: You are not pleading to protect somebody else, are you?

THE DEFENDANT: No, sir.

THE COURT: I can't hear you.

THE DEFENDANT: No, sir.

THE COURT: And you are pleading guilty because you are guilty?

THE DEFENDANT: Yes, sir.

THE COURT: And not for some other reason?

THE DEFENDANT: Yes, sir.

THE COURT: Very well. I will accept the plea.

THE CLERK: Are you Willie Abraham?

THE DEFENDANT: Yes.

THE CLERK: On Indictment 62 Criminal 949, United States of America vs. Willie Abraham, filed October 22, 1962, the grand jury charges that on or about the 18th day of August 1962, in the Southern District of New York, Willie Abraham, the defendant, unlawfully, wilfully and knowingly did receive, conceal and facilitate the transportation and concealment of a

narcotic drug, to wit, approximately 352 grams, 200 milligrams of heroin hydrochloride after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law and that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics may find necessary to provide for medical and legitimate uses only is prohibited. Sections 173 and 174, Title 21 United States Code.

At this time, do you wish to withdraw your plea of not guilty and plead guilty to this indictment?

THE DEFENDANT: Yes, sir.

THE CLERK: And how do you plead?

THE DEFENDANT: Guilty.

MR. GOLD: Your Honor, the Government is ready for sentence at this time.

THE COURT: Is the defendant also ready?

MR. STONE: Yes, sir.

THE COURT: Very well.

MR. GOLD: Your Honor, the defendant has told you that he is thirty-two years of age. He is married and has been for thirteen years. He has two children,

both are girls. One is eleven years of age; the other is twelve years of age. It is my understanding that he resides with his family on Prospect Avenue in the Bronx. He has been employed as a truck driver, according to his own statement.

He has no previous convictions of anything other than State misdemeanors. He was convicted several times of policy, and, as I understand it, this is the extent of his criminal record.

As your Honor knows, the defendant now faces a possible sentence --

THE COURT: A mandatory sentence.

MR. GOLD: -- a mandatory sentence of five years, a maximum of twenty. I should state to your Honor that --

THE COURT: Is there anything to indicate that the defendant is himself an addict?

MR. GOLD: No, your Honor. The defendant is not an addict.

I should indicate that the amount of heroin involved in this particular case is 352 grams, approximately a third of a kilogram, and the percentage of heroin was high.

This is a one-count possession case. Agents

of the Bureau of Narcotics apprehended the defendant in his automobile when they saw him throw the package out of the automobile upon his seeing the agents.

I have nothing further to add, your Honor.

MR. STONE: Your Honor, the defendant certainly stands humbly before the Court --

THE COURT: I can't hear you.

MR. STONE: The defendant stands humbly before the Court at this time with a plea of guilty. Mr. Gold has certainly informed the Court accurately as to his family status, and I think most accurately concerning the fact that his only involvement with the law prior to this time was a few policy convictions in the State of New York.

The defendant certainly realized what he was doing at the particular time. Whether he realized the magnitude of what he had done is certainly not a question to determine innocence or guilt, because he in fact was guilty. We made several applications at pre-trial to bring forth what we believed was the informer in this particular case, with the hope in mind that if we could find the informer, perhaps he could explain and mitigate the circumstances involving the defendant's situation. We were unable to and were unsuccessful to

bring forth this witness, not to mitigate the fact that he knew what he was doing, but to bring forth the fact that he may not have known until after he was arrested what volume of narcotics he had in his possession.

I respectfully request that the Court consider the fact that he certainly has been a man true and loyal to his family. This is his first time in Federal Court. I realize that the minimum sentence is very great, indeed, and I respectfully request that the Court consider that sentence.

MR. GOLD: Excuse me, your Honor. There is one further fact that I failed to call to the Court's attention, and that is this: While the defendant has no prior record of any kind for narcotics, the files of the Bureau of Narcotics show that in three separate cases defendants have named this defendant, Abraham, as their source of supply.

THE COURT: Now I am addressing the defendant personally. Would you like to say anything? Have you anything that you want to say before sentence is passed on you?

THE DEFENDANT: No, sir.

THE COURT: You are sure, now?

THE DEFENDANT: No, sir.

THE COURT: All right. The defendant is sentenced to a term of five years.

- - -

[U. S. DISTRICT COURT
Filed
Jan 10 1963
S. D. N. Y.]

(Certification)

s/ Murray Padgug
Official Court Reporter
U. S. District Court

AFFIDAVIT OF JEFFREY I. GLEKEL
IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:
SOUTHERN DISTRICT OF NEW YORK)

JEFFREY I. GLEKEL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York. I am familiar with the files and records pertaining to the above captioned case.

2. This affidavit is submitted in opposition to petitioner Willie Abraham's motion pursuant to 28 U.S.C. § 2255 to vacate a 1963 guilty plea and conviction for violation of the federal narcotics laws.

3. Indictment 62 Cr. 949 filed on October 22, 1962, charged petitioner in one count with the unlawful possession and transportation of 352 grams of imported heroin in violation of Sections 173 and 174, Title 21, United States Code.

4. After the completion of extensive pre-trial hearings on petitioner's discovery and

suppression motions conducted before the Honorable Edward Weinfeld, United States District Judge, on November 5, 26, snf 37, 1962, petitioner entered a guilty plea on January 8, 1963, before the Honorable John F. X. Mc Gohey, United States District Judge and was sentenced to a term of five years imprisonment.

5. Although petitioner long ago completed serving this five year sentence, he is presently serving a life sentence imposed on June 26, 1973 by the Honorable Frederick vP. Bryan, United States District Court Judge, for another narcotics offense (72 Cr. 1159).

6. Petitioner now moves to vacate his 1963 guilty plea on the grounds that it was involuntary because it was made without knowledge that (1) he would be ineligible for parole and (2) that a jury could not have convicted him if it believed he was ignorant of the fact that the narcotics he possessed were illegally imported. As set forth in the accompanying Memorandum of Law, the Government does not oppose an evidentiary hearing on those claims but will contend that they are conclusively refuted by the facts and circumstances surrounding the entry

of petitioner's guilty plea.

s/ Jeffrey I. Glekel
JEFFREY I. GLEKEL
Assistant United States Attorney

(Duly sworn to on
April 1, 1974.)

MEMORANDUM AND ORDER APPEALED FROM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

KNAPP, D.J.

Petitioner seeks pursuant to 28 U.S.C. §2255 an order vacating a 1963 federal narcotics conviction achieved by his plea of guilty, on the grounds that when the plea was accepted 1) he was not informed by the court, his counsel or anyone else of his ineligibility for parole and 2) he was not aware of a possible defense to the indictment. Petitioner long ago completed service of the five-year sentence imposed under the challenged conviction. He is now serving a life sentence imposed pursuant to 21 U.S.C. §848 by Judge Van Pelt Bryan in 1973 following a narcotics conviction by a jury. That conviction was affirmed, U.S. v. Abraham et al (1974) slip op. 3413.

At oral argument the government conceded that petitioner had adequately demonstrated the necessity for an evidentiary hearing to determine the truth of petitioner's allegations.

As already stated, petitioner purports to seek the desired order pursuant to 28 U.S.C. §2255. It is established however that §2255 may not be invoked by a petitioner who is no longer in custody under the judgment of conviction he seeks to attack. U.S. v. Morgan (1954) 346 U.S. 502, U. S. v. Garguilo (2d Cir. 1963) 324 F.2d 795, U.S. v. Johnson (S.D.N.Y. 1967) 269 F. Supp. 767, fn. 2.

Banks v. U. S. (S.D.N.Y. 1970) 319 F. Supp. 649, is not to the contrary. There then - District Judge Mansfield held that the petitioner had standing to invoke the court's jurisdiction under §2255 despite the fact that the sentence pursuant to the conviction being challenged had long since been served, because such challenge to the earlier conviction constituted a challenge - even though indirect - to the sentence petitioner was currently serving (at 650):

> "(Petitioner) apparently hopes that if he is successful in annulling that [earlier] conviction he will be able to vacate the sentence presently being served as a second narcotics offender and be eligible for re-sentencing as a first narcotics offender. Since he thus indirectly seeks to attack a sentence presently being served, he appears to have standing to invoke this court's jurisdiction pursuant to §2255 and the petition may not be dismissed as a collateral attack upon a sentence already served." (citation omitted, emphasis supplied)

Such is not the situation here. The "second offender" statute operative in Banks has since been repealed. Instant petitioner was sentenced to life not as the result of any mandatory effect of his earlier conviction here under attack, but pursuant to 21 U.S.C. §846, which provides, inter alia:

> "(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment * * * ; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment ***."

The conviction here challenged was not under the quoted section. Thus the reasoning of Banks is here inapposite.

It may well be that petitioner could revise his §2255 petition to assert a challenge to the sentence imposed by Judge Bryan that he is presently serving. Under U.S. v. Tucker (1972) 404 U.S. 443, such a challenge might be held to support §2255 jurisdiction were it established that Judge Bryan's sentence was founded "at least in part upon misinformation of constitutional magnitude." id. at 447. However, in light of the fact that a Rule 35 motion can still timely be made before

Judge Bryan we find it unnecessary to decide the question of §2255 jurisdiction. A Rule 35 motion could properly bring to Judge Bryan's attention the possibility that his sentence was influenced by a possibly illegal prior conviction. In our view such a motion addressed to Judge Bryan is the best vehicle for resolution of the question raised in the petition.

The petition is dismissed without prejudice to the filing of a Rule 35 motion before Judge Bryan.

SO ORDERED.

Dated: New York, New York
July 2, 1974.

s/ Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

S I R :

PLEASE TAKE NOTICE, that Petitioner appeals to the United States Court of Appeals for the Second Circuit from the order of the United States District Court, Southern District of New York (Knapp, J) signed on July 2, 1974, and filed on July 5, 1974, dismissing the petition.

Dated: N. Y., N. Y.
July 11, 1974

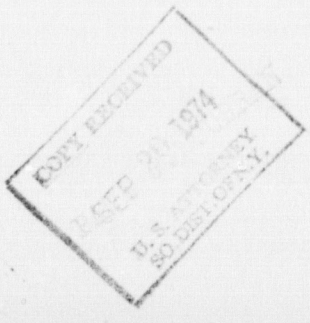
Yours etc.,

JAY GOLDBERG
Attorney for Petitioner
299 Broadway
New York, N. Y. 10007
(212) 374-1040

TO:

JEFFREY I. GLEKEL, ESQ.
Ass't. U. S. Attorney
U. S. Courthouse
Foley Square
New York, N. Y. 10007

Warden, Fed. Det. Hdqrts.
427 West Street
New York, N. Y.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